2015 IL App (2d) 150168
No. 2-15-0168
Opinion filed November 6, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOEL P. PERRY and LAURA A. PERRY,	)	Appeal from the Circuit Court
	)	of Jo Daviess County.
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 13-MR-34
	)	
FIDELITY NATIONAL TITLE	)	
INSURANCE COMPANY,	)	Honorable
	)	William A. Kelly,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Justices Burke and Spence concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiffs, Joel P. and Laura A. Perry, sued defendant, Fidelity National Title Insurance Company, seeking a declaration that it was obligated to defend them in an underlying action brought by plaintiffs' neighbors. That suit sought to prevent plaintiffs from placing improvements on an easement for access to their property. The trial court granted defendant judgment on the pleadings. Plaintiffs appeal, contending that the trial court erred in holding that the neighbors' suit did not trigger defendant's duty to defend. We reverse and remand.

¶ 2 On March 1, 2010, defendant issued plaintiffs a title insurance policy. The policy covered property that plaintiffs owned at 1450 S. Snipe Hollow Road in Elizabeth (designated Parcel 1), as well as a 30-foot easement (designated Parcel 2) for ingress and egress across an adjacent parcel.

The policy covered, among other risks, loss or damage caused by "Unmarketable Title," defined as "Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title." However, the policy specifically excluded coverage for "[t]erms and provisions of the easement described as Parcel 2 herein, as contained in the document creating said easement."

¶ 3 On July 2, 2010, the owners of the servient parcel, David and Dana Hundreiser, sued plaintiffs to enjoin them from paving and otherwise improving the access strip. The Hundreisers' complaint alleged as follows. The Hundreisers used the area burdened with the easement as pasture for their cattle, and paving the easement would interfere with this use. Moreover, the area was part of a conservation zone and, when the easement was created, the parties had an unwritten understanding that the area would not be improved. The complaint further alleged that plaintiffs would continue to have access to their property without the improvements.

¶ 4 Plaintiffs filed a counterclaim, in which they alleged that the subdivision of the property left their parcel landlocked and that, accordingly, their deed included an easement for ingress and egress and defined a specific path across the Hundreisers' parcel. Without a driveway between their parcel and Snipe Hollow Road, they were effectively denied the easement granted in the deed, and their parcel's value was markedly diminished.

¶ 5 Plaintiffs tendered defense of the action to defendant. Defendant refused, stating that the Hundreisers' lawsuit did not implicate any covered risks under the policy. Defendant argued that the Hundreisers' suit did not dispute plaintiffs' title to the easement, but merely disputed how they could use it.

¶ 6 In the meantime, the trial court ruled for plaintiffs in the underlying action. This court affirmed in part, reversed in part, and remanded. *Hundrieser v. Perry*, 2013 IL App (2d) 121321-U. While the appeal was pending, plaintiffs moved for summary judgment in this case. Plaintiffs asserted that the underlying action raised at least the possibility of coverage under the policy in that the inability to improve the easement would render title to the main property unmarketable. They claimed that the dirt trail across the easement became muddy and often impassible during wet weather, leaving the main parcel essentially landlocked. In response, defendant continued to maintain that the Hundreiser suit did not dispute plaintiffs' title to the easement and that, because coverage under the policy was not implicated, defendant had no duty to defend plaintiffs in that case. At the hearing on the motion, defendant argued that coverage under the policy "just isn't" broad enough to encompass the allegations of the underlying complaint.

¶ 7 Following a hearing, the trial court denied plaintiffs' summary-judgment motion. The court essentially agreed with defendant that there was no duty to defend under the policy because the underlying action did not dispute plaintiffs' title to the easement. Defendant then orally moved for judgment on the pleadings. The trial court granted the motion and plaintiffs appeal.

¶ 8 Plaintiffs contend that the trial court erroneously held that defendant had no duty to defend. They argue that the underlying suit at least potentially implicated coverage under the policy because the policy protects against loss caused by unmarketable title and the underlying suit had the potential to make plaintiffs' title unmarketable by eliminating access to their property as granted in the deed. In response, defendant renews its contention that the policy simply does not cover allegations that do not directly contest plaintiffs' title to the easement.

¶ 9 A motion for judgment on the pleadings is like a motion for summary judgment that is limited to the pleadings. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d

127, 138 (1999). Judgment on the pleadings is proper if the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *M.A.K. v. Rush-Presbyterian-St. Luke's Medical Center*, 198 Ill. 2d 249, 255 (2001). "For purposes of resolving the motion, the court must consider as admitted all well-pleaded facts set forth in the pleadings of the nonmoving party, and the fair inferences drawn therefrom." *Employers Insurance of Wausau*, 186 Ill. 2d at 138. We review the grant of judgment on the pleadings *de novo*. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005). Additionally, the construction of an insurance policy is a question of law, which we review *de novo*. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010).

¶ 10 An insurance policy is a contract, and the primary object of contract construction is to ascertain and give effect to the parties' intentions as expressed in their agreement. *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). If an insurance policy is clear and unambiguous, we must give the language its plain meaning. *Id.*; *American Family Mutual Insurance Co. v. Jeris*, 376 Ill. App. 3d 1070, 1073 (2007).

¶ 11 The purpose of title insurance is to protect a transferee of real estate from the possibilities of loss through defects that cloud title. *First National Bank of Northbrook, N.A. v. Stewart Title Guaranty Co.*, 279 Ill. App. 3d 188, 192 (1996). The policy insures against defects in the title to the land, not the land itself. *Id.* Title insurance policies, like other insurance policies, should receive a practical, reasonable, and fair construction consistent with the apparent object and intent of the parties, viewed in light of their purpose. *Id.* at 193. Where doubts or ambiguities in a policy do exist, they should be liberally construed in favor of the insured. *Rackouski v. Dobson*, 261 Ill. App. 3d 315, 317 (1994).

¶ 12 The trial court held that defendant had no duty to defend plaintiffs in the underlying action. In deciding whether an insurer has a duty to defend its insured, the court must look to the allegations in the underlying complaint and compare these allegations to the policy's relevant coverage provisions. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 393 (1993); *Sabatino v. First American Title Insurance Co.*, 308 Ill. App. 3d 819, 822 (1999). If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, then the insurer has a duty to defend its insured in the underlying action. *Crum & Forster*, 156 Ill. 2d at 393. We read the underlying complaint liberally in deciding an insurer's duty to defend. *State Farm Mutual Automobile Insurance Co. v. Pfiel*, 304 Ill. App. 3d 831, 834 (1999). Thus, an insurer is required to defend its insured whenever the alleged conduct is potentially within the policy's coverage, even if the insurer discovers that the allegations are groundless, false, or fraudulent. *Id.* Moreover, a court may look beyond the allegations of the underlying complaint in determining the existence of a duty to defend. *Metzger v. Country Mutual Insurance Co.*, 2013 IL App (2d) 120133, ¶ 26. "The insurer's duty to defend is much broader than its duty to indemnify its insured." *Crum & Forster*, 156 Ill. 2d at 393-94.

¶ 13 We agree that plaintiffs raised at least the possibility of coverage under the policy, thus triggering defendant's duty to defend. The failure to provide ingress and egress to a property can render title unmarketable. *Melcer v. Zuck*, 245 A.2d 61, 64 (N.J. Super. Ct. App. Div. 1968). In *Melcer*, for example, the sellers of a parcel guaranteed ingress and egress to it but failed to take any steps to create an easement for that purpose, thus allowing the purchasers to terminate the contract. *Id.*

¶ 14 Here, likewise, the Hundreiser complaint raised the possibility that plaintiffs would be effectively denied the easement granted in the deed. Plaintiffs' deed included a specifically

defined easement for ingress and egress. Plaintiffs asserted, however, that without improvements the easement could not consistently allow ingress and egress. Thus, while defendant is correct that the underlying suit did not dispute the validity of plaintiffs' *title* to the easement, the suit did place at issue whether the easement could actually be conveyed. That is, it placed at issue the marketability of plaintiffs' title. See *id.*

¶ 15 Plaintiffs here seek only reimbursement for defense costs (having at least partially prevailed in the underlying suit), and the duty to defend is broader than the duty to indemnify. *Crum & Forster*, 156 Ill. 2d at 393-94. Because the underlying suit was at least potentially within the policy's coverage, defendant had a duty to defend plaintiffs in that litigation.

¶ 16 In response, defendant essentially renews its argument that the policy's coverage "just isn't" broad enough to cover this situation. However, defendant cites no case suggesting that the "Unmarketable Title" provision is not broad enough to encompass this situation. *First National Bank of Northbrook*, on which defendant principally relies, is clearly distinguishable. There, the title company issued to a bank a location note endorsement containing a mistaken description of the land. However, it was undisputed that the bank did not see the mistaken document until after its borrower had defaulted on a note. Thus, the bank did not rely on the endorsement in making the loan, so its loss did not result from the mistaken endorsement. *First National Bank of Northbrook*, 279 Ill. App. 3d at 194-95.

¶ 17 Defendant observes that plaintiffs' "claim could have also been denied by [defendant] under Schedule B, Special Exception Number 2" of the policy. However, defendant does not even *quote* that provision, much less develop an argument that it excludes coverage here, thus forfeiting such an argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). In any event, the special exception mentioned excludes coverage for loss by virtue of the "[t]erms and provisions of

the easement described as Parcel 2 herein, as contained in the document creating said easement." At most, this provision, purporting to exclude coverage for anything related to the terms and provisions of the easement, conflicts with the portion of the policy covering losses caused by unmarketable title. This creates an ambiguity, which we must resolve in favor of the insured. See *Rackouski*, 261 Ill. App. 3d at 317.

¶ 18 The judgment of the circuit court of Jo Daviess County is reversed, and the cause is remanded.

¶ 19 Reversed and remanded.